

TO: Alejandro Mayorkas, Deputy Secretary,
Department of Homeland Security

FROM: Ellen Gallagher, Senior Policy Advisor,
Civil Rights and Civil Liberties

DATE: July 23, 2014

SUBJECT: **The Use of Segregation for Immigration Detainees**

Summary: The purpose of this memorandum is to elevate for review by the Department of Homeland Security (DHS) Deputy Secretary the use administrative and disciplinary segregation for detainees in immigration custody. Particularly with regard to detainees with "special vulnerabilities," the Performance-Based National Detention Standards (PBNDS) in conjunction with ICE Directive 11065.1, "Review of the Use of Segregation for ICE Detainees," require that segregation be used "only as a last resort and when no other viable housing options exist."¹ Implementation of this requirement necessitates a range of resources applied in general and other modified custodial settings that ICE reports is lacking. This has resulted in segregation being used across detention facilities as a first, not last resort, with "sentences" of up to 60 consecutive days, or more. Segregation, also termed "twenty-four hour lockdown," is routinely applied to immigration detainees for: "Violations of the Rules/Regulations; Inappropriate Behavior; Self-Threatening Behavior; Posing a Threat to the Security of the Facility; and To Avoid Conflict Between Yourself and Others."² Some groups, including detainees with serious mental illness or a prior sex offense, are placed automatically in long-term administrative segregation. Others move chronically back and forth from the general population to administrative or disciplinary segregation, with periodic, crisis-oriented admissions to psychiatric hospitals punctuating their return to the same disturbing cycle. I have attempted to document and elevate within and beyond CRCL my concern regarding the widespread and at times extreme use of solitary confinement for detainees in immigration custody. More specifically, I have identified what I believe to be an ongoing violation of existing policies and procedures that require the use of less restrictive alternatives prior to imposing administrative or disciplinary segregation. In a meeting with Officer Megan H. Mack and other CRCL staff on July 10, 2014, I recommended that the Officer brief Secretary Jeh Johnson on this topic, and also share available information on segregation to inform the DHS Office of the Inspector General's open report (OIG-11-62) on "Management of Mental Health Cases in Immigration Detention." I respect the Officer's decision not to pursue either course of action at this time, however, after consultations with Ethics Counsel and notice through my established chain of command, I feel obligated to seek your review.

Nature and Scope of Segregation: In accordance with ICE Directive 11065.1, administrative segregation is "a non-punitive form of separation from the general population for administrative reasons."³ It is authorized "only as necessary to ensure the safety of the detainee, facility staff, and other detainees; the protection of property; or the security or good order of the facility, and therefore should be for the briefest term and under the least restrictive conditions practicable, consistent with the rationale for placement."⁴ Disciplinary segregation is "a punitive form of separation from the general population that is authorized only pursuant to the order of a facility disciplinary panel, following a hearing in which the detainee is determined to have committed serious misconduct in violation of a facility rule, and only consistent with the Disciplinary

¹ See "US Immigration and Customs Enforcement's New Directive on Segregation: Why We Need Further Protections," John Marshall Law School (February 2014) at pp. 11-14 indicating appropriate sanctions from least to most restrictive.

² See Douglas County Department of Corrections Documents re: [REDACTED] at Attachment 5.

³ U.S. Immigration and Enforcement Directive 11065.1, Review of the Use of Segregation for ICE (DHS 2013) § 3.1.

⁴ *Id.*

Severity Scale from the applicable ICE standards, and only when alternative dispositions would inadequately regulate detainee behavior.”⁵ Detainees with special vulnerabilities are defined within ICE Directive 11065.1 as including, “those who are known to be suffering from mental illness or serious medical illness; who have a disability or are elderly, pregnant or nursing; who would be susceptible to harm in general population due in part to their sexual orientation or gender identity; or have been victims – in or out of ICE custody – of sexual assault, torture, trafficking or abuse.”⁶ As indicated previously, placement in administrative segregation for detainees with special vulnerabilities is permitted, “only as a last resort and when no other viable housing options exist.”⁷ The Directive further states, “A detainee’s age, physical disability, sexual orientation, gender identity, race or religion may not provide the sole basis for a decision to place the detainee in involuntary segregation.”⁸ Nor should detainees with a medical or mental illness, or identified as being a suicide risk or on a hunger strike remain in segregation if “the IHSC determines that the segregation placement has resulted in deterioration of the detainee’s medical or mental health, and an appropriate alternative is available.”⁹

ICE Directive 11065.1 requires Headquarters oversight and review related to the use of segregation in detention facilities. ICE Enforcement and Removals Operations (ERO) Custody Management Division (CMD) compiles a weekly Segregation Report based on field data to track detainees held in segregation for 14 days (either consecutive or within a 21-day period), 30 days, and at every 30 day interval thereafter, or within 72 hours for detainees with a special vulnerability. Each Segregation Report typically describes up to 200 detainees, the vast majority of whom are unrepresented, being placed into disciplinary or administrative segregation for reasons that range from “suicide risk” to “mental illness” to “protective custody: criminal offense,” to “pending investigation of disciplinary violation,” “disciplinary” or “medical: other.” Given reporting restrictions, it is difficult to know exactly how many detainees in immigration custody are placed in segregation every day, and for what specific or cumulative timeframe. While IHSC staffs 16 of 204 detention facilities nationwide, they recognize that severe resource shortages have resulted in a polarized approach to managing detainees. Essentially, where a detainee’s behavior or characteristics are perceived to be disruptive, evidence of noncompliance, or a threat to the general population or “good order” of the facility, segregation serves as a default remedy. Administrative and disciplinary segregation “sentences” are further marked by imposition of the maximum time permitted under the PBNDS, even for initial, isolated or minor transgressions without meaningful consideration or application of less restrictive alternatives. The use of restraints to handcuff, shackle and strip-search detainees placed for protracted periods in administrative or disciplinary segregation is another feature of this problem.

Cases: To illustrate anecdotally how the PBNDS and ICE Directive 11065.1 are being applied with respect to segregation decisions, I offer the following examples. Related case information is attached and labeled.

- 1) [REDACTED] – The detainee is seriously mentally ill and suicidal (psychotic disorder with hallucinations). He was sentenced to 60 days in disciplinary segregation after a facility staff person interpreted his statement, “The first chance I get, I am going to get one of you...” as a threat toward him “and his fellow officers.” The detainee is unrepresented, refused to participate in or sign documents related to his disciplinary hearing, and received a one-page dismissal of his pro-se Disciplinary Appeal requesting imposition of a lesser period of segregation.
- 2) [REDACTED] – The detainee was placed into administrative segregation on 6/7/2014 pending investigation of a disciplinary violation. On 6/10/2014, he was put on a “Level 1 mental health watch, which was lowered to a Level 2 on 6/12/2014.” One day later, he was sanctioned to

⁵ *Id.* § 3.2.

⁶ *Id.* § 3.3.

⁷ *Id.* § 5.2.

⁸ *Id.*

⁹ *Id.* The Immigration and Customs Enforcement’s Health Service Corps (IHSC) serves as the agency’s medical authority, providing direct or arranging outside care for detainees. As of August 2010, the DHS OIG found vacancy rates at 11 of the (then) 18 facilities staffed by IHSC to be 50% or more. (OIG-11-62, March 2011).

14 days in disciplinary segregation for "creating a disturbance." According to the Shift Commander's notes, Mr. [REDACTED] was the victim of a physical assault (he was punched repeatedly by another detainee) and "at no time" attempted to retaliate. He did verbally criticize the detainee that attacked him.

- 3) [REDACTED] – The detainee received 15 days of disciplinary segregation for "an act that could endanger a person" and "refusing staff orders" after he repeatedly threatened to commit suicide. While doing so, he climbed atop his bunk and jumped onto a cement floor. He then "took a towel and wrapped it around his neck pulling it very tight with his hands." Mr. [REDACTED] was placed in restraints, escorted out of his cell for medical evaluation and found to pose a risk to the safety and security of the facility.
- 4) [REDACTED] – The detainee has a history of mental illness (mood disorder and depression), including a previous suicide attempt. She is a lawful permanent resident from Haiti who received two consecutive (but for one day) sentences to disciplinary segregation. The first, from June 1-13, was for "threatening another inmate." The second, from June 14-24, was for "engaging in sexual acts" (shortly after her release to the general population on June 13th, she kissed consensually another detainee).

Monitoring: ICE Directive 11065.1 establishes a Detention Monitoring Council (DMC) with one subcommittee co-chaired by CMD and the Office of Detention Policy and Planning. The subcommittee consists exclusively of ICE personnel though "a representative from the DHS Office for Civil Rights and Civil Liberties (CRCL) may participate in subcommittee meetings as CRCL deems appropriate, but CRCL shall not use information ICE shares with CRCL pursuant to such participation in any CRCL investigation or inquiry."¹⁰ Since issuance of ICE Directive 11065.1 on September 4, 2013, the subcommittee has met once. During the week of July 7, 2014, CRCL arranged a forum with ICE staff, many of whom serve on the DMC subcommittee, to discuss how symptomology related to mental illness may form the basis of disciplinary segregation, especially in facilities underserved by IHSC. This exchange highlighted a pronounced lack of resources – medical, structural, and in terms of training/education – that fuels overreliance on administrative and disciplinary segregation. It also suggested that where detention facilities keep individuals in segregated settings due to serious medical or mental health conditions, such segregation may be non-therapeutic, e.g., in a small or open short stay unit without padded cells, or may mirror disciplinary "lock-down" including extremely limited out-of-cell time. Such placements can impose improper punitive conditions, and subject vulnerable detainees to physical and mental deterioration. I have provided in prior email messages to the CRCL Officer and other staff articles, reports and investigations highlighting the detrimental effects of solitary confinement,¹¹ and have reviewed as I hope you will CRCL's April 11, 2013 "Findings Regarding Mental Health Issues in Segregation." I am available should you require additional information.

Attachments:

- 1 - [REDACTED] - Pinal County Disciplinary Documents
- 2 - [REDACTED] - Pike County Disciplinary Documents
- 3 - [REDACTED] - Northwest Detention Center Disciplinary Documents
- 4 - [REDACTED] - York County Prison Disciplinary Documents
- 5 - [REDACTED] - Douglas County Department of Corrections Disciplinary Documents

¹⁰ *Id.* § 7.5.

¹¹ Among items earlier conveyed was an April 2013 report by Physicians for Human Rights entitled, "Buried Alive: Solitary Confinement in the US Detention System," <http://physiciansforhumanrights.org/library/reports/buried-alive-solitary-confinement-in-the-us-detention-system.html>, the 2012 American Psychiatric Association Position Statement on Detained Immigrants with Mental Illness, <http://www.psychiatry.org/advocacy--newsroom/position-statements>, and the Department of Justice's "Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation" (May 31, 2013), http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.